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STATE OF MICHIGAN
IN THE SUPREME COURT

MARY ANN HEGADORN,
Plaintiff-Appellant,

v

SC: 156132
COA: 329508
Livingston CC: 2014-028394-AA

DEPARTMENT OF HEALTH AND HUMAN SERVICES DIRECTOR,
Defendant-Appellee
_____/

ESTATE OF DOROTHY LOLLAR, by DEBORAH D TRIM, Personal Representative
Plaintiff-Appellant,

v

SC: 156133
COA: 329511
LivingstonCC: 2014-028395-AA

DEPARTMENT OF HEALTH AND HUMAN SERVICES DIRECTOR,
Defendant-Appellee
_____/

ROSELYN FORD,
Plaintiff-Appellant,

v.

SC: 156134
COA: 331242
Washtenaw CC: 15-000488-AA

DEPARTMENT OF HEALTH AND HUMAN SERVICES DIRECTOR,
Defendant-Appellee

PLAINTIFFS-APPELLANTS MARY ANN HEGADORN, ROSELYN FORD, and THE ESTATE OF DOROTHY LOLLAR

REPLY BRIEF

Steward & Sheridan, PLC
By: James B. Steward (P23098)
Angela M. Hentkowski (P71609)
Attorneys for Plaintiffs-Appellants
205 South Main St.
Ishpeming, MI 49849
Telephone: 906.485.6311
Facsimile: 906.485.6315

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ARGUMENT

I. THE "ANY CIRCUMSTANCES RULE" APPLIES TO THE INDIVIDUAL ONLY, and NOT TO THE INDIVIDUAL'S SPOUSE.

As explained in our prior brief, the meaning of the phrase "if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual," as used in 42 USC 1396p(d)(3)(B), hinges on the meaning of the term "individual".[1] The Department contends that the term "individual" as used in that provision refers to any generic "individual," including the individual applicant's spouse. Appellants assert that such term refers only to the Medicaid applicant not the applicant's spouse.

So, to determine which meaning is correct, we must look carefully at the wording of 42 USC 1396p(d)(3)(B)(i) in relation to the rest of 42 USC 1396p(d) and the other provisions of Medicaid law. That paragraph [42 USC 1396p(d)(3)(B)(i)] says that if "there are any circumstances under which payment from the trust could be made to or for the benefit of *the individual*" the portion from which the payment could be made will "be considered resources available to *the individual* . . . ." (Emphasis added). This is sometimes referred to as the "Any Circumstances Rule" of 42 USC 1396p(d)(3)(B). Note there is no mention of the spouse in this provision, although the "individual's spouse" is mentioned in other parts of 42 USC 1396p(d). The provisions of 42 USC 1396p(d)(2) which deal with determining who established and funded the trust is a completely different question from determining whether assets are available to *the individual* identified under 42 USC 1396p(d)(3)(B)(i). Furthermore, past Congressional action demonstrates that the spouse is **not** to

[1] See Appendix 1 submitted herewith for the full text of 42 USC 1396p

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be included under the Any Circumstances Rule. Here is why:

1. OBRA 93 added Subsection (d) to 42 USC 1396p, including Paragraph (d)(3).[2]

2. 42 USC 1396a(r)(2) and State Medicaid Manual 3257(B)(4) instruct states to use generally the Title XVI (SSI) definition of assets for Title XIX (Medicaid) purposes.[3]

3. Six years after OBRA 93, Congress enacted the Foster Care Independence Act of 1999 ("Foster Care Act").[4] Section 205(a) of the Foster Care Act added trust provisions to the SSI resource provisions of 42 USC 1382b. Subsection (e)(3)(B) of 42 USC 1382b tracks the Any Circumstances Test of OBRA 93 which applies to Medicaid recipients, **with one very important exception**:

> In the case of an irrevocable trust established by an individual, if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual *(or of the individual's spouse)*, the portion of the corpus from which payment to or for the benefit of the individual *(or of the individual's spouse)* could be made shall be considered a resource available to the individual.
> (Emphasis added to highlight additions made by Foster Care Act applicable to the SSI program)

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[2]Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 § 13611(b), 107 Stat. 312, 624.

[3]See Appendix 2 submitted herewith for the full text of 42 USC 1396a and Appendix 3, State Medicaid Manual 3257-3259 "Transmittal 64"

[4]Foster Care Independence Act of 1999, Pub. L. No. 106-169 § 205(a), 113 Stat. 1822, 1833.

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4. Because the Medicaid resource rules generally track the SSI rules, the 1999 addition of 42 USC 1382b(e)(3)(B) would set up a conflict between the SSI version of the Any Circumstances Test (spouses included) and the Medicaid version (individuals only, spouses not mentioned) unless Congress took some clarifying action.

5. Congress could have simply amended the Medicaid version which is at issue in this appeal [42 USC 1396p(d)(3)(B)(i)] to correspond with the new SSI version. But Congress did not do so. Rather, the same section of the Foster Care Act (paragraph 205(b)(3)) added the following to the Medicaid asset provisions of 42 USC 1396a(10)(G):

> that, in applying eligibility criteria of the supplemental security income program under subchapter XVI of this chapter for purposes of determining eligibility for medical assistance under the State plan of an individual who is not receiving supplemental security income, *the State will disregard the provisions of subsections (c) and (e) of section 1382b of this title . . . .* (Emphasis added);[5]

From this review, it can be seen that Congress clearly had no intention of applying the Any Circumstances Rule of 42 USC 1396p(d)(3)(B) to the spouse of a Medicaid applicant, because it specifically directed the states not to do so in 42 USC 1396a(10)(G).

II. THE STATUTORY MEDICAID PROVISIONS PERMIT MARRIED COUPLES TO MAKE "SOLE BENEFIT OF" TRANSFERS OF ASSETS THAT EXCEED THE CSRA AMOUNT, AND THEREBY CONVERT AN OTHERWISE COUNTABLE "RESOURCE" TO A NON-COUNTABLE FORM.

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[5]The reference to 1382b(c) was actually added after the Deficit Reduction Act of 2005 to decouple the new 60 month look back from the existing SSI look back of 36 months

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The Department argues that

> "Their [the Appellant's] interpretation would eviscerate means-testing by allowing a community spouse to stash assets, even millions of dollars, in the "right" trust and thus to make it disappear for Medicaid purposes. The Court of Appeals correctly held that Congress did not intend this, and the law and policy do not permit it."[6]

And further,

> "Congress provided explicit instructions to calculate the appropriate amount of assets that the community spouse may keep for his or her basic needs and still permit the institutionalized spouse to meet the means-testing to qualify for Medicaid benefits to pay the nursing home expenses. The assets of both spouses, regardless of how they are held, are counted when determining the eligibility of the institutionalized spouse."[7]

Although these arguments have nothing to do with an analysis of the term "individual" as used in 42 USC 1396p(d), they must be addressed because the Department's assertions misstate the manner in which eligibility is determined and which "assets" are actually "counted" when determining eligibility. For example, the correct term as used in the statute is "resources" which has a particular meaning: "If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse)."[8]

The process that a married couple must follow when considering an application for Medicaid coverage for long term care costs is explained accurately in Morris v Oklahoma Dept of Human

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[6] Department brief, p 1

[7] Id.

[8] 20 CFR 416.1201

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Services[9]:

> For a married long-term care applicant, the process of receiving Medicaid coverage generally begins with a request for assessment. At the beginning of the first continuous period of institutionalization of the institutionalized spouse, the couple may request that the state assess the "total value of the resources to the extent either the institutionalized spouse or the community spouse has an ownership interest," and a "spousal share," equal to half of that amount. § 1396r–5(c)(1)(A) & (B). For many couples the "spousal share" will be used to establish the CSRA—the amount of resources the community spouse may keep without affecting the institutionalized spouse's eligibility. *See* § 1396r–5(f)(2)(A)(ii) & (c)(2)(B). This resource assessment can, but need not, occur as "part of an application for medical assistance." § 1396r–5(c)(1)(B).
>
> The next subsection of this statute discusses resource allocation at the "time of application for benefits." § 1396r–5(c)(2). This subsection is entitled "Attribution of resources at time of *initial eligibility determination.*" *Id.* (emphasis added). At this point, "all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse," but "only to the extent" that amount exceeds the CSRA. *Id.*
>
> Finally, § 1396r–5(c)(4), titled "Separate treatment of resources after eligibility for benefits established," provides that "after the month in which an institutionalized spouse is determined to be eligible for benefits ..., no resources of the community spouse shall be deemed available to the institutionalized spouse." Id.[10]

As noted in *Morris,* "In other words, the purchase of certain annuities may allow the conversion of disqualifying resources into exempt income."[11] And further:

> The State Medicaid Manual acknowledges this issue and attempts to distinguish between annuities "validly purchased as part of a retirement plan [and] those which abusively shelter assets." Health Care Fin. Admin., U.S. Dep't of Health & Human Servs., State Medicaid Manual 64 § 3258.11 (1994). This section of the manual is commonly referred to as "Transmittal 64." It continues:

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[9] *Morris v Oklahoma Dept of Human Services*, 685 F3d 925 (CA 10 2012)

[10] Id at 929-930 (internal footnotes omitted)

[11] Id at 930

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> The exceptions to the transfer of assets penalties regarding interspousal transfers and transfers to a third party for the sole benefit of a spouse apply even under the spousal impoverishment provisions. Thus, the institutional spouse can transfer unlimited assets to the community spouse or to a third party for the sole benefit of the community spouse.
>
> When transfers between spouses are involved, the unlimited transfer exception should have little effect on the eligibility determination, primarily because resources belonging to both spouses are combined in determining eligibility for the institutionalized spouse. Thus, resources transferred to a community spouse are still [to] be considered available to the institutionalized spouse for eligibility purposes.
>
> *The exception for transfers to a third party for the sole benefit of the spouse may have greater impact on eligibility because resources may potentially be placed beyond the reach of either spouse and thus not be counted for eligibility purposes.* However, for the exception to be applicable, the definition of what is for the sole benefit of the spouse (see § 3257) must be fully met. This definition is fairly restrictive, in that it requires that any funds transferred be spent for the benefit of the spouse within a time-frame actuarially commensurate with the spouse[']s life expectancy. If this requirement is not met, the exemption is void, and a transfer to a third party may then be subject to a transfer penalty.[12]

In other words, in spite of the Department's claims to the contrary, the Medicaid Act does not prohibit spouses from restructuring their resources after the Community Spouse Resource Allowance calculation to cause some assets to no longer be a "countable resource" of the Medicaid applicant (the "individual" as used in the statute applicable here).

> The weight of authority supports this interpretation. . . . [citations ommitted]
>
> This is also the reading of the statute adopted by the agency charged with administering the Medicaid program. . . . As that agency forthrightly acknowledged in Transmittal 64, "[t]he exception for transfers to a third party for the sole benefit of the spouse may have greater impact on eligibility because resources may potentially be placed beyond the reach of either spouse and thus not be counted for

[12] Id at 930-931, emphasis from *Morris* court opinion

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eligibility purposes." State Medicaid Manual § 3258.11.

> Finally, despite its presumed awareness of these judicial and administrative interpretations, ... Congress has not revised the Medicaid statute to foreclose this option. Indeed, rather than close the annuity "loophole," Congress has twice amended the Medicaid statutes to specify the types of annuities capable of producing uncountable spousal income.[13] [citations omitted]

Or, stated another way, the "sole benefit of" transfer rule is not limited by the Community Spouse Resource Allowance calculation, and married couples are indeed permitted to make "sole benefit of" transfers of assets that exceed the CSRA amount, and thereby convert an otherwise countable "resource" to a non-countable form.[14] As observed by the court in Hughes v McCarthy:

> *If Congress prefers the interpretation that applies § 1396p(c)(1)(F) notwithstanding § 1396p(c)(2)(B)(i), it need only amend the statute.*[15]

III. POMS SI 01120.201 IS INAPPLICABLE TO THIS CASE

The Department has included POMS SI 01120.201 apparently as support for its position that the "individual's spouse" is to be included under the provisions of 42 USC 1396p(d)(3)(B)(i), even though that paragraph does not include that term.[16] However, POMS SI 01120.201 is based on Section 205 of the Foster Care Independence Act of 1999 (42 USC 1382b), and is not a part of Subchapter XIX (Medical Assistance). Rather, 42 USC1382b falls within Subchapter XVI which controls Supplemental Security Income for Aged, Blind, and Disabled. This is clearly stated by the second sentence of POMS SI 01120.201, which the Department has ommitted from its brief:

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[13] Id at 933-934

[14] *Hughes v McCarthy*, 734 F3d 473, 481 (CA 6 2013)

[15] Id at 486; emphasis added.

[16] see Department's brief page xv-xvi

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> Section 205 of this law provides, generally, that trusts established with the assets of an individual (or spouse) will be considered a resource **for Supplemental Security Income (SSI) eligibility purposes**. [emphasis added][17]

As shown above at Part I of this brief, Section 205 of the Foster Care Independence Act of 1999 (42 USC 1382b) is specificaly stated to be inapplicable to Medical Assistance determinations by 42 USC 1396a(10)(G).

IV. THESE APPLICANTS WERE DENIED FUNDAMENTAL DUE PROCESS BY THE RETROACTIVE APPLICATION OF THE DEPARTMENT'S NEW INTERPRETATION.

It is undisputed that at the time Appellants submitted their respective applications, the Department's consistent policy interpretation for nearly two decades was that "spousal sole benefit trusts" were not countable assets,[18] and that all three of these applications were filed before the Department made the change in its interpretation of the "Any Circumstance Rule" contained in its BEM 401 which is based on 42 USC 1396p(d)(3)(B)(i).[19]

The Department claims that it was simply correcting a prior mistake in interpretation, so no notice to the public was needed before implementing the change. The Department has admitted that under its prior interpretations, these Claimants would have qualified.[20]

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[17]The full text of POMS SI 01120.201 is attached as Appendix 4

[18] Lollar Tr. ALJ hearing, held 11/5/2014, p 27

[19]See Lollar Tr. ALJ hearing, held 11/5/2014, p 27; Hegadorn Tr. ALJ hearing pp 58-59; Ford Tr. ALJ hearing, held 3/19/2015, p 30

[20] Id.

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The Court of Appeals in this case refused to follow Tompkins v. Dempsey, 97 Mich.App. 218 (1980), even though that case mirrors the factual situation in this case. As held in Tompkins:

> We find that the administrative law judge erred in concluding that the new regulation applied, where the delay of 5 ½ months was in no way attributable to the plaintiff. This result is unsupportable in view of 42 U.S.C. s 602(a) (10), which requires that ADC payments must be furnished with reasonable promptness to all eligible individuals. Such applications are required to be acted on within 30 days except when the record clearly shows that the delay resulted from circumstances under the claimant's control or from some administrative or other emergency that could not reasonably be controlled by the agency. Delay cannot be justified by the agency's heavy case load.[21]

The Department cites *In re Kurzyniec Estate*, 207 Mich App 531, 538 (1994) as providing support for its failure to process these applications under its interpretation of its rules which was in effect at the time these applications were filed. However, under the facts of the *Kurzyniec Estate* case, notice of the new policy was published in advance of its implementation and the applicant had applied **after** the published effective date. Those facts are clearly not present here and therefore the holding of *In re Kurzyniec Estate* also does not apply here.

The Department further asserts that it could not provide advance notice of its change in policy because if it applied the earlier policy interpretation to these applicants, the state could be at risk of losing funding for its programs. However, the Department has not provided any actual evidence that its prior interpretation created such risk. To the contrary, the Department had been applying the purported erroneous interpretation for some 20 years without any repercussions from the Federal government.

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[21] *Tompkins v Dempsey*, 97 Mich App 218, 223, 224; 293 NW2d 771, 774 (1980); citations ommitted.

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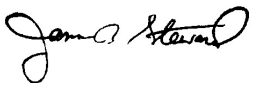
CONCLUSION AND RELIEF REQUESTED

The Court of Appeals opinion has now been released as a published opinion, which means that the errors in that Court's analysis will be perpetuated far beyond these particular cases to the further detriment of the citizens of this State. It is not these Claimants who are circumventing "Congress express requirements", but rather the State that is doing so by refusing to follow the statutory provisions applicable to these circumstances. The Department's policy, or its interpretation of that policy and the corresponding Federal statutes, cannot be permitted to have the effect of changing the federal law provisions that the State is required to follow.

For the reasons stated, the Plaintiffs-Appellants respectfully request that Supreme Court to grant their Application for Leave and reverse and vacate the Court of Appeal's opinion dated June 1, 2017. This relief can be awarded peremptorily or following further argument and/or briefing on the merits.

RESPECTFULLY SUBMITTED,

STEWARD & SHERIDAN, P.L.C.



Dated: August 31, 2017

James B. Steward (P23098)
Angela M. Hentkowski (P71609)
Attorneys for Plaintiffs-Appellants
205 S. Main Street
Ishpeming, MI 49849
Telephone: (906) 485-6311
Facsimile: (906)485-6315